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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 827

THE FLORIDICE COMPANY, INC., ET AL

Petitioners

versus

W. WILLARD WIRTZ, Secretary of Labor,
United States Department of Labor

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit entered in this cause.

DECISION TO BE REVIEWED

This Petition seeks review of a decision of the Court of Appeals for the Fifth Circuit rendered in *Wirtz* v. *The Floridice Company, Inc., et. al.*, 381 F.2d 613 (1967). The opinion was filed July 3, 1967 and petition for rehearing was denied August 21, 1967. The opinion is copied as Apendix I. The findings of fact and conclusions of law of the United States District Court for the Middle District of Florida are unreported but are set out as Appendix II.

JURISDICTION

Jurisdiction is based on 28 USCA Section 1254 (1).

The decision of the Court of Appeals for the Fifth Circuit conflicts with decisions of other Courts of Appeals and this Court. The question presented should be definitely and specifically settled by this Court.

QUESTION PRESENTED

WHETHER AN INTERPRETIVE BULLETIN PROMULGATED BY THE WAGE-HOUR ADMINISTRATOR, DEPARTMENT OF LABOR, AS A GUIDELINE FOR ENFORCEMENT OF THE ACT, CONCLUSIVELY DETERMINES WHAT IS A "RETAIL SALE" IN THE ICE INDUSTRY.

STATUTES INVOLVED

Section 13 of the Fair Labor Standards Act of 1938 (29 USCA Section 213) provides in part:

> (a) the provisions of Section 6 & 7 shall not apply with respect to
>
> > (2) any employee employed by any retail or service establishment, more than 50 percentum of which establishment's annual dollar volume of sales of goods or services is made within the state in which the established is located***. A "retail or service establishment" shall mean an establishment 75 percentum of whose annual dollar volume of sales or goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry***.

Also involved are several sections of CFR, Title 29, Part 779.

STATEMENT OF THE CASE

Respondent brought this action in the United States District Court for the Middle District of Florida charging Petitioners with certain violations of the Fair Labor Standards Act of 1938 (29 USCA Section 201 et. seq.).

Petitioners presented several defenses including the "retail establishment exemption" afforded by Sections 13 (a), (2) and (4) of the Act. Upon all the evidence offered, the District Court found as a fact and held that Petitioners had established their entitlement to the retail establishment exemption.

Respondent appealed to the Court of Appeals for the Fifth Circuit on the sole question whether 75 per cent of Petitioner's sales were recognized as retail in the ice industry. The Court of Appeals held that the guidelines (interpretive bulletin) prepared by the Wage-Hour Administrator were conclusive and that 75 per cent of Petitioner's sales were non-retail according to the guidelines.

Petitioners brought this Petition for a Writ of Certiorari to review the decision of the Court Appeals.

STATEMENT OF THE FACTS

Floridice is a small ice company normally employing about eight persons. Annual gross sales are in the $80,000 range. All of Floridice's activities take place at one establishment, except distribution of its ice. Sales are made locally only within the City of Tampa. (Finding of Fact No. 3, R 96).

Petitioners adduced considerable probative testimony from industry members on what is considered a retail sale in the ice industry.

Raymond A. David, president of Duval Ice & Coal Co., of Jacksonville, Florida, had been in the ice business for 17 years (R 169). He is a member and director of the National Association of Ice Industries (R 169). He had attended National Conventions regularly since 1946 (R 170) and exchanged ideas with other industry members.

William E. Rumph had approximately 10 years experience managing ice companies (R 196-197).

Celestino Arias testified: "I have been in the ice business all my life." (R 212). He had performed all functions in the manufacture and sale of ice (R 213). He is a director of the Florida Ice Association (R 214), and has had considerable contact with industry members (R 214-15).

George Stovall testified that he had approximately 18 years in the ice business (R 241). He had attended Florida and national conventions regularly, and at the time he testified was president of the Florida Ice Association (R 242). He is acquainted with numerous members of the industry and has had frequent discussions with them concerning the industry.

Domenick Ippolito testified that he had over 20 years experience in the ice business in Tampa (R 143), that he is familiar with all phases of the trade (R 143-44), and that he is familiar with the industry generally and the terms used in it.

Walter Preston Russ had been engaged in the ice business for 47 years (T 903).

All of these men testified that sales of ice to a customer who consumed the ice and did not resell it were recognized as retail sales in the ice industry. David testified: "Well, I think historically any ice that is not

sold for resale is considered retail." (R 172). He also said, "Wholesale is ice that is sold for resale. Wholesale ice is sold to someone who has a license to resell it." (R 172). Rumph testified that in his opinion "anything that is directly sold to the consumer is a retail sale." (R 198). Arias said: "A retail sale is a sale to the consumer of ice." (R 215). Ippolito testified that the term "retail sales" was used in the ice business (R 146), and that he defined a sale as retail if the buyer consumed it (R 146). Russ said a retail sale "is a sale that is consumed by the consumer, and we in the industry call it a 'one time sale'." Ferlita said: "A retail sale, in my opinion, is any consumer that consumes the ice their own self and it is not for resale." (R 475).

These persons, experienced in the ice industry, generally classified all sales as retail except sales to peddlers, independent substations and other ice companies because those purchasers are the only ones reselling the ice (R 146-149, 198-200, 216-218). A retail sale is motivated by the purchaser's immediate *need* for consumption. A wholesale sale is motivated by profits.

In addition, Arias, a competitor, testified that he had personal knowledge of Floridice's operation and that it was considered a retail establishment in the industry (R 216, 229-31). Ferlita testified that Floridice would be classified as a retail establishment in the ice industry (R 476). Russ testified that in his opinion Floridice was a retail establishment (R 457).

Petitioners Exhibit 115 is a recapitulation of sales made by Floridice during 1960, 1961, 1962 and the first eight months of 1963. On the basis of classifying sales not for resale as retail, and sales for resale as wholesale, the following percentages were determined:

Year	Retail %	Wholesale %
1960	87.56	12.44
1961	88.96	11.04
1962	84.58	15.42
1963	80.85	19.15

Based on these percentages, along with the total annual sales, Arias, David, Rumph and Stovall were each asked a hypothetical question, whether in his opinion Floridice would be recognized as a retail establishment in the ice industry. They replied that Floridice would be recognized as a retail establishment in the industry. (R 229-31, 232-34, 238-39, 250-51).

Respondent attempted to rebut this evidence. Some evidence was admitted and some was profert. The District Court found that "Even if all the evidence offered by plaintiff including that admitted and that declared inadmissible, is considered, defendants have met their burden of proof." (Finding of Fact No. 5, R 96).

The District Court found that Floridice met all the criteria for the retail establishment exemption:

"Defendants have accurately classified their sales according to indusetry recognition of those sales. Defendants have computed the percentages necessary to qualify for the retail exemption.

"All of the defendants' sales are made within the State of Florida; more than 75% of defendants' annual dollar volume of sales is not for resale; more than 75% of defendants' annual dollar volume of sales is recognized as retail sales in the ice industry; defendants' establishment is recognized as a retail establishment in the ice industry; more than 85% of defendants' annual dollar volume of sales of ice which it produces is made within the State of Florida; and defendants' ice is produced at the establishment which sells the goods." (Findings of Fact Nos. 6 & 7, R 97).

ARGUMENT

AN INTERPRETIVE BULLETIN OF THE WAGE-HOUR ADMINISTRATOR, DEPARTMENT OF LABOR, PROMULGATED AS A GUIDELINE FOR ENFORCEMENT OF THE FAIR LABOR STANDARDS ACT, IS NOT CONCLUSIVE AS A MATTER OF LAW ON THE ISSUE OF WHAT IS A "RETAIL SALE" IN THE ICE INDUSTRY.

Petitioners adduced considerable probative testimony from members of the ice industry on what is a retail sale in the ice industry.

Respondent attempted to counter this evidence by the interpretive bulletin which provides:

> "In determining whether the requirements of the 13 (a) (2) exemption, that 75 percent of the establishment's sales must not be made for resale and must be recognized as retail sales in the industry, are net, all sales of ice will be regarded as retail except:
>
> (a) Sales for resale.
>
> (b) Sales of ice for icing railroad cars and for icing cargo trucks. However, sales of ice for the re-icing of cargo trucks are recognized as retail if such sales do not fall into the non-retail categories described in paragraphs (c), (d) and (e) of this section.
>
> (c) Sales of ice in railroad car lots.
>
> (d) Sales of ice of a ton or more.
>
> (e) Sales of ice at a price comparable to that charged by the establishment to dealers or, if no sales are made to dealers by the establishment, at a price comparable to or lower than the prevailing price to dealers in the area." 29 CFR § 779.357

This bulletin was received in profert.

One witness presented by Respondent was a lawyer, Joseph Goldberg, who purportedly was responsible for establishing the guidelines. Goldberg's testimony was not received in evidence but a profert of his testimony was permitted.

The District Court held that even considering the profert, petitioners were entitled to the retail establishment exemption. The Court of Appeals reversed and held that the guidelines were controlling even though petitioners were given no opportunity to demonstrate that the guidelines were contrary to industry recognition and were not established in good faith after inquiry into industry practices. The effect of the decision of the Court of Appeals is to make respondent's guidelines binding, as a matter of law, even though those guidelines are wholly without foundation.

Of the six criteria that a business establishment must meet to qualify for the retail establishment exemption, respondent only raised one question: Whether 75% of Floridice's annual dollar volume of sales is recognized as retail sales in the ice industry. An orderly review of the legislative history of the retail establishment exemption is necessary to put this question in proper focus.

Under the Fair Labor Standards Act as enacted in 1938, Section 13(a)(2) exempted

> "Any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce."

"Retail or service establishment" was not defined in the Act. The administrator sought to limit the exem-

tion to only those establishments which sold predominantly to individuals for personal and family consumption. If the customer was a commercial establishment which used the goods for business purposes the sale was deemed nonretail by the administrator. See *Roland Electrical Co. v. Walling,* 326 U.S. 657, 90 L.Ed 383 (1946). Congress was unhappy with this "business use" test.

In 1949, Congress considered amendments to the 1938 Act. The original Administration bill in the House H.R. 3190 (Lesinski bill), incorporated the Administrator's "business use" test by defining retail selling or servicing as "selling or servicing to private individuals for personal or family consumption." (H.R. Rept. 267, 81st Cong., 1st Sess. 1949) This definition was approved by the House Labor Committee as part of H.R. 5856, which replaced H.R. 3190. However, the House rejected the "business use" test and substituted the "recognition in the industry" test. (95 Cong. Rec. 11126-31).

The Senate bill was similarly modified on the floor by amendment introduced by Senator Holland, the floor leader for the bill. (95 Cong. Rec. 12491).

Congressman Lucas sponsored the retail exemption provision in the House. He explained the "recognition" test as follows:

> "This means that any sale or service to a private consumer, businessman (who does not purchase to resell) or farmer will have to be treated by the Administrator and courts as a retail sale or service, so long as such sale or service is recognized in the particular industry as a retail sale or service. Thus, the sale by a farm implement dealer of farm mach-

inery to a farmer will be retail irrespective of the fact that in some cases farm machinery may be sold to the farmer at a discount, if the sale is regarded as retail in such industry.

* * *

"Under the amendment the courts would decide the question of what sales or services are recognized as retail in the particular industry."

In arguing for the amendment in the Senate, Senator Holland said:

"Of course, the purpose of the entire fight made against the amendment, as I understand, is the unwillingness of the Administrator to accept the conclusion that business sales are in many instances, in fact, in most instances, in the average small business in our towns and cities, retail sales and are so regarded by those who made the purchases. The purpose of the amendment is to make that perfectly clear, so that no administrator, whether the present one, or his successor, may depart from that rule. (95 Cong. Rec. 12497)

* * *

"The amendment thus has the effect of confirming the exception for the various local neighborhood business which it was the original purpose of the existing law to exempt. Included among such businesses are the grocery stores, the hardware stores, the clothing stores, the dry-goods stores, restaurants, hotels, theatres, stationery stores, farm-implement dealers, automobile dealers, coal dealers, paint stores, furniture stores, and lumber dealers. "Anyone opposing the proposed amendments must necessarily take the position that Congress, in granting the retail and service establishment exemption, intended to reject what is traditionally recognized as a retail sale or service in industry, and to adopt an arbitrary concept of what is retailing or servicing which has no meaning in industry.

> "I call particular attention to that. The Congress used the terms 'retail' and 'service establishment' in their customary meaning, in their customary application, as they were customarily understood in the various industries of the nation." (95 Cong. Rec. 12498)

Senator Aiken moved unsuccessfully to strike the recognition test. Senator Holland replied:

> "I think the Aiken amendment to my amendment is without foundation and without merit. There is no proper background against which to determine the meaning of 'retail sales or service' without looking to see the meaning of the term 'retail sales' or the term 'retail services' in the particular industry which is affected. That already is implicit in the act we now have. When we talk about retail or service establishments, there must be a definition. Of course, that definition should properly be laid against the background of the understanding of the people affected by it, as to what constitutes retail services or retail sales." (95 Cong. Rec. 12519)

Congress had revolted at the Administrator's interpretation of retail. No longer was a small business to be subject to the Act solely because it sold its product to another business. Even if the unit price varies, the sale will still be deemed retail if so recognized in the industry.

In light of this history, every court which has considered the question has held that the testimony of industry members is relevant and highly probative. Indeed, in several earlier cases the Fifth Circuit has recognized that testimony of industry members will carry the employer's burden of proving entitlement to

the exemption. *Mitchell v. T. F. Taylor Fertilizer Works, Inc.*, 233 F.2d 284 (5th Cir. 1956); *Boisseau v. Mitchell*, 218 F.2d 734 (5th Cir. 1955).

In *Norman v. Moseley*, 313 F.2d 544, 545 (8th Cir. 1963), defendant "operated a small woodworking or cabinet shop in Pine Bluff, Arkansas, with annual sales volume of approximately $100,000. Defendant built cabinets for sale to homeowners and contractors, and molds for making transformers used in interstate commerce. "The District Court determined that the defendant dealt with the contractors as a seller of goods who delivered and installed goods he sold, and that the sale of cabinets were 'retail sales' within the meaning of § 13 (a) of the Act." Defendant's testimony was held sufficient.

> "The defendant testified that he considered his business 'as a retail operation.' Robert L. Carty, of Fort Smith, Arkansas, a cabinet-maker and former employee of the defendant, testified that in his opinion 'the Moseley Cabinet Shop and similar operations in the industry are considered as retail business.' Gene Owens, one of the plaintiffs, testified that he 'is in the same type of business as Mr. Moseley which is a retail business.' John H. Turley, of Pine Bluff, a building contractor, testified that he was 'familiar with the business known as the Moseley Cabinet Shop' and considered it a retail business. Ray Stewart, of Pine Bluff, the manager of a building supply company, testified that his place of business is next door to the Moseley Cabinet Shop, and that in his opinion the Moseley Cabinet Shop would be 'classed as a retail sales outlet.' Harold Dunlap, of Pine Bluff, office manager for Standard Lumber Company, testified that in his opinion 'the Moseley Cabinet Shop is known in the industry as a retail operation.'"

In *Wirtz v. Modern Trashmoval, Inc.*, 323, F.2d 451, (4th Cir. 1963) the Court said:

> "In the present case, not only does the testimony of members of the industry support Modern's claim to being a retail or service establishment, but so also do many of the general criteria set forth by the Department of Labor in its administrative regulations. A *practical view of the physical facts of record clearly indicates that Modern is engaged in a local business offering services to 'ultimate' consumers.* Dr. Entenberg's judgment as to whether Modern's service is retail or wholesale, while properly authoritative in his academic field, fails to affect the issue before us because it was based upon the 'business use' test which can no longer be used in considering exemptions under section 13(a) (2)." (Emphasis added.)

The Court of Appeals in the case at bar purportedly relied solely on this Court's decision in *Wirtz v. Steepleton General Tire Co.*, 383 U. S. 190, 15 L.Ed 2d 694 (1966). But nowhere in *Steepleton* does this Court hold that the Administrator's guidelines are binding as a matter of law, that an employer cannot challenge the Administrator's determinations, or that the testimony of industry members will not carry the employer's burden. Indeed, *Steepleton* indicates that the guidelines can be challenged and overcome.

In *Steepleton*, this Court rejected "the industry's usage as the single touchstone . . . ." 383 U. S. at 202. Of course such rejection does not eliminate industry usage from consideration or make some other criterion the single touchstone.

Moreover, in *Steepleton* this Court noted that Steepleton had not challenged the guidelines "save as is implicit in its claims that the Secretary's position here does not correspond toward usage in the industry." In Steepleton it was accepted that the guidelines were designed after inquiry into industry practices. This situation does not exist in the case at bar.

The purported guidelines of the Secretary were not admitted in evidence, and consequently petitioners did not have an opportunity to attack the findings of the Secretary or to show that they did not satisfy the requirement of industry recognition. Therefore, it cannot be decided, on the basis of the record in this cause, whether the guidelines were, in fact, established in good faith "after inquiry into industry practices" and as a reflection of industry recognition. In other words, Petitioners have not had an opportunity to show that no effort was made by the Secretary to determine or to consider what sales were actually "recognized as retail" in the ice industry during the pertinent period.

Nevertheless from the profert of Goldberg, it affirmatively appears that the Secretary's guidelines *do not accord with recognition in the industry.* During the course of direct examination on the profert, Goldberg was asked what industry representatives he relied upon to support the Secretary's definition of a retail sale. The only person he named was a Mr. William T. Jobe, to whom he referred at least five times in the course of his testimony (R 342, 355, 349, 350 352). However, on cross examination on the profert the witness admitted that not only Mr. Jobe, but the entire ice industry, disagreed with the Secretary's definition, as evidenced by a Bulletin published by the National Association of Ice Industries over Mr. Jobe's signature within two months of the issuance of the interpretive bulletin, wherein industry recognition was stated as follows:

" 'What is a retail sale of ice?

" 'The ice industry has always taken the stand that only those sales of ice that are made for purposes of resale are considered nonretail sales.' "

(R. 356)

The testimony of Goldberg was as follows:

"Q. Well, do you agree with what he says here on Page 3 of this Bulletin, Mr. Goldberg:

'What is a retail sale of ice?
'The ice industry has always taken the stand that only those sales of ice that are made for purposes of resale are considered nonretail sales.'

Do you agree with that, sir?

"A. Do I agree with the statement, or do I agree with the fact he made it?

"Q. Do you agree with the statement of this one authority, whom you have mentioned to the Court as a possible source of information incorporated into your Bullentin, sir?

"A. This statement—

"Q. Could you answer the question, Mr. Goldberg? Do you agree with the statement of Mr. Jobe made in a bullentin published by the Association to [616] which you referred, on February 2, 1956?

"The Court:

Where he is telling along the same topic you are, he is telling what the industry believes, you see?

"The Witness:

I understand, your Honor.

"The Court:

And he says the industry believes that that is the only one. Now, do you believe that, yourself

"The Witness:

He is asking me whether I agree with the *industry's position*? (Emphasis ours)

"The Court:

That's right.

"The Witness:

My answer is, I do not on the basis of what I testified before.

"The Court:

You set out against Mr. Jobe; is that it?

"The Witness:

With respect to that particular statement, yes indeed, sir.

(R 355-357)

The "particular statement" was the only issue involved in Respondent's contest of the application of the retail establishment exemption.

The proper effect to be given this interpretive bulletin has been stated by this Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140, 89 L.Ed. 124, 129 (1944):

"We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their

> authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."

There is no hint in *Steepleton* that this Court intended to overrule *Skidmore* v. *Swift & Co.*

The Court of Appeals in the case at bar has accorded greater weight to the guidelines than respondent ever intended. The following statements appear in the interpretive bulletin itself:

> "The distinction between a retail sale and a wholesale is one of fact." 29 CFR §779.327(a)
>
> "It was emphasized in the debates in Congress that while the views of an industry are significant and material in determining what is recognized as a retail sale in a particular industry, the determination is not dependent on those views alone." 29 CFR §779.323
>
> "The responsibility for making final decisions, of course, rests with the Courts." 29 CFR § 779.324

The guidelines only become controlling if in fact the court determines that the Administrator has used the criteria applicable to the industry to reach an accurate conclusion in accord with the legislative intent. This is what *Steepleton* holds.

The validity of the guidelines for the ice industry is cast in grave doubt by Goldberg's admission that his decision on what is a retail sale is contrary to industry recognition. Moreover, the guidelines relating to ice sales lack logic and reasonableness which further diminishes their persuasiveness. A sale of ice of a ton

or more is arbitrarily classified as a wholesale sale by the Administrator. Ice sells at $4.00 per ton to other ice companies (a wholesale sale) and $7.00 per ton to shrimp boats (a retail sale) (R. 157). The maximum amount of ice required by a railroad car is 8 tons. This would be a $40.00 sale, hardly a staggering figure. Yet sales of ice in railroad car lots are arbitrarily classified as wholesale sales.

There is no similiarity between Floridice and Steepleton. Floridice's annual dollar volume of sales is about $80,000.00; Steepleton is in the million dollar range. Floridice employs about 8 persons even though continuous operation is required; Steepleton employed 47 workers. Floridice sells its ice only in the City of Tampa within a five mile radius of its plant; Steepleton did business in several states and regularly solicited customers in Tennessee, Arkansas and Mississippi. 330 F.2d at 806.

Moreover, ice and tires are incomparable. Ice is perishable by nature. A customer of ice does not buy in quantity to obtain a discount; he buys only what he needs for *immediate* consumption regardless of quantity. The owner of a truck fleet may buy in quantity, anticipating future needs, to obtain a discount; not so with the ice consumer. Only when ice is bought for resale does the element of preservation for future need arise; not so with tires. Competition, not the quantity purchased, primarily controls the price of ice (R. 223, 254-255).

Such diversity in industry practices was noted by this Court in *Steepleton*:

> "In view of the diversity of structure and marketing practices in different industries, flexibility is certainly appropriate, and we do not here further attempt to adduce general rules." 383 U.S. at 205

The quality and guantum of proof by the Secretary in the case at bar is considerably less than in *Steepleton*. In *Steepleton* an "established pattern of quantity discounts" was shown. In *Steepleton* "The Secretary showed that the industry sometimes used the word retail in other senses that excluded commercial sales and that commercial customers of Steepleton did not regard their purchases as retail transactions." 383 U.S. at 195.

Discounts may be a criterion for determining what is a wholesale sale in the tire industry, but prices have little value in classifying ice sales. David testified:

> "In the industry there are many different price structures, and they vary . . . You will receive a lower unit price for a small quantity of ice than you do for a larger quantity, depending on who you are selling it to." (R 178).

Rumph and Arias also said price was not a reliable criterion (R 202, 215).

The different treatment accorded discounts is entirely consistent with the interpretive bulletin:

> "Typically, retail sales are made to the general *consuming public.*" 29 CFR § 779.32(a)
>
> "If the practice in a particular industry is such that a discount from the normal retail price is not regarded in the industry as significant in determining whether the sale of a certain quantity or whether the sale of such a quantity will be considered a wholesale sale would be determined without reference to the price." 29 CFR § 779.327(b).

In the ice industry breweries and shrimp boats are part of the *consuming public;* and price is insignificant in classifying sales.

It is interesting to note elsewhere the interpretation put on *Steepleton* by the Secretary. In *Rachal* v. *Allen*, 376 F 2d 999 (5th Cir 1967), the Secretary urged that sales at discount are not retail as a matter of law. This construction of the Secretary was rejected by the Court of Appeals. Of course the construction urged by the Secretary was also contrary to the Secretary's interpretive bulletin.

Congress regarded ice plants that sold what they manufactured to consumers as typical establishments exempt from the Act. 95 Cong. Rec. 14932. This has been recognized by the Secretary:

> "The legislative history indicates that ice plants are among the establishments which may qualify as retail establishments under the Section 13(a)(4) exemption." 29 CFR § 779.358

If Floridice is not a retail ice plant, it is difficult to conceive that any ice plant is exempt. No ice plant could be more local or retail in character than Floridice. A business with gross sales of $230.00 per day must necessarily be a small, neighborhood business.

Yet in the case at bar the following has occurred:

(1) One man (Goldberg) has determined that ice sales of a ton or more are non-retail sales which determination is admittedly contrary to recognized industry practices;

(2) This determination has never been admitted into evidence, but the Court of Appeals says it is binding on petitioners;

(3) Petitioners have not been permitted to challenge Goldberg's determination, but the Court of Appeals says it is binding on petitioners.

The legislative history and court decisions, including *Steepleton* show conclusively that determinations of what are retail sales are questions of fact for the courts. Even the interpretive bulletin recognizes this. The District Court found as a fact, even considering the profert by respondent, that Floridice was entitled to the exemption.

The decision of the Court of Appeals in the case at bar would, if perpetuated, give the Secretary unbridled power to allow or deny the exemption. This smacks of dictatorship.

The decision of the Court of Appeals interpreting *Steepleton* to the effect that the Secretary's guidelines are absolutely controlling and cannot be challenged has created an embarrassing conflict of decision with *Steepleton* itself with *Skidmore* v. *Swift & Co.*, supra, and with the numerous decisions holding that what is a retail sale is a question of fact for the court. The result of *Steepleton* that the guidelines are controlling when properly prepared and when challenged only by pure word-usage cannot be extended to make controlling guidelines that may have been arrived at fraudulently and in bad faith. Such an extension causes a conflict with *Steepleton* which holds, at least impliedly, that the guidelines can be challenged.

This Court should grant certiorari and permit presentation of the merits, and ultimately reinstate the District Court's finding of fact that 75% of Floridice's sales are retail sales.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I CERTIFY that this petition was served upon opposing counsel by mailing two copies thereof this 16th day of November, 1967, to Charles Donahue, Solicitor of Labor, and Bessie Margolin, Associate Solicitor, United States Department of Labor, Washington, D. C. 20210.

CHARLES W. PITTMAN

(R 495-502)

APPENDIX I

W. Willard WIRTZ, Secretary of Labor,
United States Department of Labor,

Appellant,

v.

The FLORIDICE COMPANY, Inc., et al.,

Appellees.

No. 21798.

United States Court of Appeals

Fifth Circuit.

July 3, 1967.

Rehearing Denied Aug. 21, 1967.

Before TUTTLE, Chief Judge, and BELL and GOLDBERG, Circuit Judges.

TUTTLE, Chief Judge:

The Secretary of Labor brought suit under the Fair Labor Standards Act (29 U.S.C.A. Sec. 201 et seq.) to restrain 'the Floridice Company, its principal officers, and others,'[1] from violating certain of the Act's provisions, and to compel Floridice to pay, for the benefit of various of its employees, certain amounts alleged to be due as unpaid minimum wages and overtime compensation.

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[1] Because of the similarity of facts and issues between this case and the case of Wirtz v. Hillsboro Ice Company, counsel stipulated that the testimony elicited for each case, to the extent relevant, would be equally applicable to the other case, and a notice of appeal filed by the Secretary in the *Hillsboro* case was dismissed by stipulation. For convenience., references in this opinion will be limited to Floridice.

The case was tried to the court without a jury, and the sole issue considered by the district judge was whether Floridice is an establishment "seventy-five per-centum of whose annual volume of sales of goods or services (or both) is not for resale and is recognized as retail sales or services in the particular industry," so as to qualify it for exemption under Section 13(a) (2) and (4) of the Act.[2]

The basic facts concerning the sales of ice made by Floridice are not in dispute. Defendants introduced the following summary (*sans* percentages) of sales for the period January 1, 1960 through August 31, 1963:

Year	Total Sales	Breweries	Shrimp Boats	Shrimp Houses	Ice Companies & Peddlers	Platform Sales
1960	$82,150	$37,615	$18,681	$5,116	$10,216	$10,520
1961	84,570	44,071	17,587	4,820	9,339	8,751
1962	89,692	43,271	21,304	4,200	11,826	7,080
1963	55,861	25,687	11,498	3,737	10,698	4,238
Approximate percentage of average annual sales:						
	100%	48%	22%	5%	15%	10%

From this summary, it is evident that, on the average, approximately seventy per cent of defendant's annual dollar volume of sales of ice represented sales to breweries (used primarily for icing railroad cars carrying shipments of beer), and to shrimp boats (each boat requiring an average of twenty-eight to thirty tons of ice per delivery). The true dispute was whether these sales met the statutory test of being "recognized as retail sales" in the ice industry.

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[2] The Secretary has not argued that the district court erred in determining that Floridice met each of the other conditions requisite to establish its claim to exemption under § 13(a) (2) and (4). Only the finding that "more than 75% of defendant's annual dollar volume of sales is recognized as retail sales in the ice industry" is challenged.

To establish the critical proposition that they were so recognized, Floridice called to the stand a number of members of the industry, each of whom testified that all sales of ice not for resale are recognized as retail sales in the ice industry.

To rebut this testimony, the Secretary offered in evidence a bulletin prepared by the Department of Labor, published in 29 C.F.R. § 779.357, which contained the Wage-Hour Administrator's determination as to what sales were recognized as retail sales in the ice industry, and the testimony of a witness who was chief of the office charged with advising the Administrator on the application of the Act's exemptions at the time the ice industry determinations were made, regarding the studies conducted and the conclusions reached in arriving at that determination. The bulletin states that in the ice industry all sales are regarded as retail except:

(a) Sales for resale.

(b) Sales of ice for icing railroad cars. * * *

(c) Sales of ice in railroad car lots.

(d) Sales of ice of a ton or more.

(e) Sales of ice at a price comparable to that charged by the establishment to dealers. * * *

Under these guidelines, it is quite plain that less than the requisite seventy-five per cent of the sales made by Floridice would be "recognized as retail," since an average of eighty-five per cent of its sales fall under exceptions (a), (b), and (d) above.

[1] The trial court, however, refused to follow these guidelines. Instead, it ruled the bulletin inadmis-

sible,[3] and took as controlling the industry's "any sale not for resale is retail" usage, evidenced by the testimony of Floridice's witnesses. On that basis, it awarded judgment in favor of the defendants.

The Secretary contends that reversal of that judgment is required by the intervening decision of the Supreme Court in the case of Wirtz v. Steepleton General Tire Co., reported *sub nom* Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190, 86 S.Ct. 737, 15 L.Ed.2d 694 (1966). His argument is, we think, well taken.

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[3] In so ruling, the district court no doubt had in mind this Court's decision in Mitchell v. City Ice Company, 273 F.2d 560 (5th Cir. 1960). There, we affirmed the action of the trial court in refusing to admit the offered bulletin because "It was tendered in evidence to be considered by the jury in passing on an issue as to which it is completely silent: 'what is considered in the industry to be retail?' " 273 F.2d at 562. Two things distinguish this case from *City Ice*. First, the Secretary's bulletin has been revised to meet the deficiency noted there and clarify any doubt about its official interpreting status. It now states:

> "In these industries the Divisions have made special studies, held hearings or consulted with representatives of industry and labor, to ascertain the facts. Based upon these facts the following determinations have been made as to which sales or establishments are, and which are not, recognized as retail in the particular industry." [29 CFR 779.354]

Second, *City Ice* involved a jury trial. The court carefully noted that "It [the bulletin] is not offered as a guide to the court in construing the statute. Cf. Skidmore v. Swift & Co., 323 U.S. 134. [65 C.Ct. 161, 89 L.Ed. 124] * * *." Since the bulletin as revised does address itself to the dispositive issue, and since the trial court was not here faced with the complications created by a jury's presence, it could without difficulty, have treated the Secretary's interpretive bulletin as a persuasive guide to the construction and application of the Act's provisions. Clearly, in the light subsequently shed by the Supreme Court's decision in Wirtz v. Steepleton General Tire Co., reported *sub nom.* Idaho Sheet Metal Works, Inc. v. Wirtz, 383 U.S. 190, 86 C.Ct. 737, 15 L.Ed.2d 694 (1966), it should have done so.

We need not now decide the difficult question whether the principles announced in *Steepleton* would require, if a jury were present, that the bulletin offered by the Secretary be actually received in evidence, or whether it would find more appropriate service as a guide to the trial judge in framing his charge to the jury.

The *Steepleton* case involved a tire company, many of whose sales were made at special prices to commercial fleet operators. The Company claimed, as defendants do here, that all sales not for resale were recognized in their industry as retail, regardless of quantity or price. Numerous witnesses so testified, and both the district court and the Court of Appeals gave controlling weight to this evidence of industry usage, rejecting the contrary classifications set forth in the guidelines covering the tire industry.

In reversing, the Court said: "The approach of the Sixth Circuit [in *Steepleton*], which took industry usage as controlling, and that of the Ninth Circuit [in *Idaho Metal*], which rejected it as the sole test, represent irreconcilable interpretations of the critical statutory language. While support can be mustered for both views, we believe the Ninth Circuit is correct * * *. After rejecting the industry's usage as controlling, we face the further difficult question of what criteria do determine when business transactions are retail under the Act * * *."

In formulating an answer to that "further difficult question," the Court made it clear that quantity and price discount are of high importance among the factors relevant to the question whether a given sale is or is not a "retail" one under the Act. It said: "Within the category of goods and services that can be sold at retail, naturally not every sale can be so classified. The exemption itself excludes any sale for resale *and beyond that, references in the legislative history * * * and common parlance certainly suggest that term retail becomes less apt as the quantity and the price discount increase in a particular transaction.*" 383 U.S. at 204, 86 S.Ct. at 746. (Emphasis added.)

Examining *Steepleton* in the light of these principles we find that the Court rejected the Government's first contention that the tire transactions relating to large trucks and industrial vehicles are intrinsically nonretail whatever the terms. It then said:

'Steepleton is, nevertheless, deprived of retail establishment exemption because—as the Government alternatively contended—*it has failed to show that the tire dealings in question were made on terms and in circumstances that qualify them as retail within the Secretary's guidelines.* The guidelines class as nonretail all sales to fleets of five or more vehicles at 'wholesale prices,' a wholesale price being defined as that charged on sales for resale or on sales to 10-vehicle fleets. * * * *These guidelines, reportedly designed after inquiring into industry practices, are quite evidently aimed at excluding from the retail category sales generally made at significant discounts and in quantity.* Given the common conception of the term retail and references in the legislative history to discount sales * * we see no reason not to sustain these guidelines * * *." Id. at 208, 86 S.Ct. at 748 (Emphasis added).

[2] The record before us shows that in addition to sales admittedly for resale averaging approximately fifteen percent of its annual dollar volume nearly one-half of defendants' sales were made to breweries for the purpose of icing railroad cars requiring up to eight tons of ice each, at prices even lower than those charged for wholesale sales to ice dealers. Another substantial portion of defendants' sales—averaging some twenty-two percent—were made to shrimp boats, delivered in amounts up to thirty tons each at prices comparable to those charged wholesale dealers. All of these sales, constituting approximately eighty-five percent of the total dollar volume of sales of ice made by defendants, are clearly excluded from these sales recognized as retail in the ice industry under the Secretary's guidelines. These guidelines, too, are "quite evidently aimed at excluding from the retail category sales generally made at significant discounts and in quantity." Like the Supreme Court in *Steepleton,* we find no good reason not to sustain them in this case.

The judgment is reversed, and the case is remanded to the district court for further proceedings not inconsistent herewith.

(R 95-97)

APPENDIX II

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, TAMPA DIVISION

WIRTZ

vs. Civil Action

THE FLORIDICE COMPANY, et al. No. 4480-Civ. T

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having tried this cause without a jury and having considered the testimony, the exhibits and all the evidence, now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Secretary of Labor brought this action to enjoin violations of the minimum wage, overtime, record-keeping and shipping provisions of the Fair Labor Standards Act (29 USCA 201, et seq.), hereinafter referred to as the Act, and to restrain defendants' withholding of compensation due their employees.

2. The Defendant, The Floridice Company, Inc., is a corporation having its principal place of business at Tampa, Florida, where it has at all times pertinent hereto been engaged in the production and sale of ice. The defendant, Salvatore C. Ferlita, is the operating head of the said corporate defendant.

3. The Floridice Company, Inc., is a small ice company normally employing about eight persons. All of Floridice's activities take place at one establishment, except distribution of its ice. Sales are made locally within the City of Tampa.

4. Defendants contend (1) that they are exempt from the Act under the retail exemption in Section 13 (a) (2) and 13 (a) (4) of the Act, (2) that certain employees are exempt from overtime provisions of the Act under Section 13 (b) (1) of the Act, and (3) that they have been voluntarily complying with the Act.

5. Defendants adduced considerable probative testimony from industry members on what is considered a retail sale in the ice industry. Plaintiff has failed to rebut the evidence. Even if all the evidence offered by plaintiff, including that admitted and that declared inadmissible, is considered, the defendants have met their burden of proof.

6. Defendants have accurately classified their sales according to industry recognition of those sales. Defendants have computed the percentages necessary to qualify for the retail exemption.

7. All of the defendants' sales are made within the State of Florida; more than 75% of defendants' annual dollar volume of sales is not for resale; more than 75% of defendants' annual dollar volume of sales is recognized as retail sales in the ice industry; defendants' establishment is recognized as a retail establishment in the ice industry; more than 85% of defendants' annual dollar volume in sales of ice which it produces is made within the State of Florida; and defendants' ice is produced at the establishment which sells the goods.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of the parties and of the subject matter of this suit.

2. Defendants are exempt within the meaning of the retail provisions contained in Section 13 (a) (2) and 13 (a) (4) of the Act.

3. Plaintiff is not entitled to the relief sought and judgment will be entered for the defendants in accordance with these findings.

In light of the foregoing, it is unnecessary to rule on the other contentions of the parties.

Dated at Tampa, Florida, this 13th day of March, 1964.

JOSEPH P. LIEB

United States District Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 827

THE FLORIDICE CO., INC., ET AL., PETITIONERS

v.

W. WILLARD WIRTZ, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR RESPONDENT IN OPPOSITION

The Secretary of Labor brought this action against petitioners under Section 17 of the Fair Labor Standards Act (29 U.S.C. 217) to enjoin violations of the minimum wage, overtime, record keeping and shipping provisions of the Act, and to restrain the continued withholding of payment of overtime compensation due certain of their employees. Petitioners denied they were subject to the Act, contending they were a "retail or service establishment" entitled to exemption under Section 13(a) (2) and (4).

Petitioners are engaged in the manufacture and sale of ice. The evidence at trial established that 10% of this ice is sold to the general public in the form of platform sales; 15% is sold to other ice companies or peddlers; 5% is sold to shrimp houses; 22% is sold to shrimp boats and 48% is sold to breweries for icing railroad cars carrying shipments of beer (Pet. App. A-2). The evidence also established that platform sales are made at prices higher than all other sales, that the sales to the shrimp boats were made at prices comparable to the price charged peddlers and that the price to the breweries was lower than that charged peddlers (R. 15-16; Pet. App. A-6).

The court below ruled that these facts established that petitioners business did not qualify for the "retail * * * establishment" exemption from the Act. In so ruling the court refused to give controlling weight to the testimony of members of the ice industry that in the industry all sales not for resale are considered retail sales. Rather, the court relied on the guidelines established by the Department of Labor for determining what sales in the ice industry are to be recognized as retail sales. These guidelines, which have been published in 29 C.F.R. § 779.357, provide that all sales in the ice industry are to be considered as retail sales except:

(a) Sales for resale.
(b) Sales of ice for icing railroad cars and for icing cargo trucks. * * *
(c) Sales of ice in railroad car lots.

(d) Sales of ice of a ton or more.
(e) Sales of ice at a price comparable to that charged by the establishment to dealers * * *.

There can be no question that under the Secretary's guidelines petitioners operation did not qualify for the "retail * * * establishment" exemption. It is equally clear that the decision of the court below is in full accord with this Court's opinion in *Idaho Sheet Metal Works* v. *Wirtz*, 383 U.S. 190.

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER, 1967.

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